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Supreme Court, U.S.
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No. 86-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

THE TEXAS EDUCATION AGENCY,
TEXAS COMMISSIONER OF EDUCATION, and
THE UNITED STATES OF AMERICA,
Respondents

REPLY OF THE LUBBOCK INDEPENDENT SCHOOL DISTRICT TO THE BRIEF OF THE UNITED STATES OPPOSING CERTIORARI

REPLY TO BRIEF OPPOSING WRIT

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10 pp

QUESTION PRESENTED

Whether a state previously found responsible for segregation in its public schools may be required to reimburse the local school districts for costs incurred in remedying the unconstitutional condition.

LIST OF PARTIES TO PROCEEDING BELOW

The Lubbock Independent School District, as Appellant, and the Texas Education Agency, the Texas Commissioner of Education, and the United States of America, as Appellees, appeared as parties before the United States Court of Appeals for the Fifth Circuit.

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REPLY OF PETITIONER TO THE BRIEF OF UNITED STATES OPPOSING CERTIORARI

I.

OPINIONS BELOW

The opinion of the court of appeals is reported at 790 F.2d 1262 and that of the district court, which is unpublished, is attached as Appendix A to Petitioner's application for certiorari.

II.

JURISDICTION

The judgment from which certiorari is sought was entered on June 4, 1986. The appellate court's order

denying rehearing was entered on July 3, 1986. Section 1254(1) of 28 U.S.C. confers upon this court jurisdiction to review the judgment in question.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article seven, section seven of the Texas Constitution prior to repeal in 1969 stated that:

> Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.

Article 2900 of the Texas Revised Civil Statutes prior to repeal in 1969 stated that:

> All available public school funds of the State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms "colored race" and "colored children", as used in this title, include all persons of mixed blood descended from Negro ancestry.

Article 2900a of the Texas Revised Civil Statutes prior to repeal in 1969 is attached as Appendix D to Petitioner's application for certiorari.

IV.

STATEMENT OF THE CASE

The "Statement of the Case" contained in the

Lubbock Independent School District's application for certiorari adequately addresses the factual circumstances involved. Brevity suggests against its restatement.

V.

REASONS SUPPORTING ISSUANCE OF WRIT

In replying to the brief submitted by the United States, the Lubbock Independent School District (LISD) urges the following:

a.

Waiver of Right to Oppose

When originally filed on August 16, 1984, the LISD's motion to reallocate desegregation cost was served upon the United States. The district hesitated acting upon the motion for several months. During this period the United States submitted nothing to the trial court or Petitioner illustrating agreement or opposition. Having voluntarily waived opportunity below to raise claims, the United States should be precluded from doing so on appeal. The LISD, therefore, objects to all consideration of the United States' opposition.[1]

b.

Texas Education Agency and Commissioner of Education Culpability

State constitutional provision, *Tex. Const.* art. 7, §7 (Vernon's 1955), and statute, TEX. REV. CIV. STAT. ANN. art. 2900 & 2900a (Vernon's 1965), established dejure segregation. The memorandum opinion, rendered by the trial court in August of 1970, found

[1]The arguments which follow are made subject to this objection.

state responsibility for the continued segregation of LISD schools after 1954. (Pet. App. E p. 2, 9,13). Precedent buttressed those finding by interposing presumptive causation. *Keyes v. School District No. 1,* 413 U.S. 189, 209-11 (1973). The opinion rendered by the trial court in 1978 neither altered the initial findings against the state nor vitiated the *Keyes* presumption. (Pet. App. for Cert. p. 7). Sufficient culpability existed to authorize imposition of remedial cost upon the Texas Commissioner of Education.

c.

Default

The United States, through its "statement", suggests affirmance because neither the State nor its Commissioner of Education participated at trial or in settlement. (Brief in Opposition p. 2-3). Nonetheless, Texas, its Education Agency and Commissioner received citation and entered appearance. By choosing not to attend trial, those defendants created circumstances tantamount to default. Grievous injury to jurisprudence results if a defaulting party is allowed to escape liability by merely professing lack of involvement at trial.

CONCLUSION

The further one travels from history the more susceptible it grows to disguise. Texas, its Education Agency and Commissioner of Education have sojourned a long way. Yet, there lies fact in the August 1970 memorandum opinion none can disguise. Petitioner's then existing black schools remained as a tradition mandated by the laws of Texas. (Pet. App. E, p. 2, 9, 13). For this, all culpable, including the Commissioner of Education, must pay; therefore, certiorari must be granted.

Respectively submitted,

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December 12, 1986.